No. 4068.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

General Steamship Corporation, (a corporation),

Appellant.

vs.

Astoria Overseas Corporation, (a corporation), Olof Anderson, O. E. Anderson, O. B. Setters, T. L. Gaul, H. Vance, Lee Drake, R. R. Bartlett and C. A. Nyquist.

Appellees.

BRIEF FOR APPELLEES.

O. B. SETTERS,
Solicitor for Appellees.
Astoria, Oregon.

The J. S. Dellinger Co., Printers, Astoria

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ARGUMENT.

In reply to the argument presented in the Brief for Appellant it will not be necessary to present to this Court an extended argument as there are but few questions to be considered by this Court. The Appellees have not disputed the claim of the Appellant and as was decided by the Hon. Judge Bean there are but two questions at issue.

First, was the assignment or mortgage given the Astoria National Bank which was necessary for the loan of Five Thousand Dollars ($5000.00) a valid assignment and mortgage so as to give the Astoria National Bank a first lien on the unpaid subscriptions to the stock?

Second, was the assignment made to O. B. Setters of the assets of the corporation for the benefit of the creditors a valid assignment?

Calling the Court's attention to the evidence of O. B. Setters on Page 31 of the Transcript of Record, the Court will note that in July 1921 it was necessary to secure a loan of $5000.00 to liquidate the then liabilities of the corporation. Quoting the witness O. B. Setters:—

> "That the defendant corporation was organized in the fall of 1920 and functioned until June 1st, 1922. That the stockholders subscribed for the bigger portion of the stock and paid a portion of the subscription at the time. That in July 1921, it became necessary for the company to borrow $5000.00. That the company at that time had no other liabilities, and its assets were the unpaid subscriptions of the stockholders of the corporation. That arrangements were made with the Astoria National Bank to borrow $5000.00 on condition that the Board of Directors endorsed the note for $5000.00, which they did, and on the further condition that the unpaid stock subscriptions of the stockholders be assigned to the Astoria

National Bank for the purpose of additional security, and by Resolution of the corporation made by the Board of Directors at the time the loan was made, the unpaid stock subscriptions of the corporation were assigned to the Astoria National Bank."

This evidence was not denied. Calling the Court's attention to Section 6880 of Olson's Oregon Laws, which Section reads as follows:—

> "**TRANSFER OF BUSINESS AS A WHOLE HOW MADE.** A sale, lease, assignment, transfer or conveyance of the business, franchise and property **as a whole,** of any corporation now existing or hereafter formed in this State, may be made with the consent of the stockholders thereof holding of record as much as two-thirds of the issued capital stock of such corporation, provided such consent be expressed at a regular or special meeting of the stockholders of such corporation called for that purpose, and provided that such sale, lease, assignment transfer or conveyance be in consideration of lawful money of the United States; and provided further that nothing herein contained SHALL **BE CONSTRUED TO LIMIT THE EXISTING POWER OF THE STOCKHOLDERS OR DIRECTORS OF SUCH CORPORATION TO MAKE SALES, LEASES, ASSIGNMENTS OR CONVEYANCES OF CORPORATE PROPERTY OTHER THAN AS HEREIN SET FORTH.**"

The Court will note from the foregoing Section that a lease, assignment, transfer or conveyance of the business, franchise and property as a whole of

any corporation, now existing or hereafter formed in this State may be made with the consent of the stockholders thereof holding of record as much as two-thirds of the issued capital stock of such corporation. This Section refers as I take it to the sale of all property of the corporation. The case at Bar shows that only the unpaid subscriptions of the stockholders were assigned as collateral for the loan of money and no attempt was made by the Board of Directors and the stockholders to dispose of all of the property of the corporation at the time that the loan was made with the bank in July 1921.

Again calling the Court's attention to the testimony of O. B. Setters on Page 34 of the Abstract of Record:—

> "That the assignment of the corporation, which was made at a time when there were no liabilities save and except this $5000.00 of the bank, was made in good faith by the Board of Directors to the Astoria National Bank for the purpose of securing said liability, and the liabilities which are enumerated in the defendant's answer as..... listed by O. B. Setters were all contracted months after this assignment was made to the bank and became a liability against the company the latter part of the year 1921 and up to the 1st, of June 1922.

The Court will note that from the above testimony that at the time of the placing of this security as collateral the corporation was not insolvent and that

it was free from all liabilities save and except the obligation it then incurred in making the loan of $5000.00 from the Astoria National Bank.

We contend that the corporation had a just and legal right to mortgage and assign the unpaid subscriptions of stock to the Astoria National Bank, and that this contention is clearly borne out in the decision rendered in the following case.

SABIN vs. COLUMBIA RIVER LUMBER & FUEL CO., et al, found in (25th Ore. 34 Pac. Page 693, quoting from subdivision "2" of Decree on Page 696:—

> "It is urged that at the time the mortgages were given the corporation was insolvent and that the bank knew or suspected that it had not sufficient means to pay all its creditors in full, and demanded security for its debts and thereby obtained an undue advantage over other creditors. If these conditions actually existed, the validity of the security so taken might well be questioned; but we do not think that there was such a condition in the financial affairs of this company as would justify the conclusion that a state of insolvency existed which would preclude a bank from demanding and receiving the security which was given for its debt. It is true that at this time the company was largely in debt, and may perhaps have been insolvent within the meaning of that term as used in bankrupt or insolvent laws. It was, however, a "going concern" engaged in the conduct of the business for which it was incorporated

and not known or believed to be insolvent by its officers or agents, and with assets exceeding its liabilities by at least $20,000.00 according to the least value placed thereon as appears from the testimony. Such a corporation can hardly be said to be insolvent, within the rule sought to be invoked in this case. It is difficult if not impossible to lay down a definition of insolvency applicable to all cases. It must necessarily be construed with reference to the facts of each particular case. In its general and popular meaning it is used to denote the insufficiency of the entire property of an individual to pay his debts, but under the bankrupt and insolvency proceedings, which were designed for the benefit of the debtor, it is used in a more restricted sense, and denotes the inability of a party to pay his debts as they become due in the ordinary course of business.

TOOF vs. MARTIN 13 Wall -40 WEBB vs. SACHS 4 Sawy. 158.

And to this effect are the authorities cited by plaintiff. We are however not disposed to apply the rigor of the rule that obtains in bankrupt proceedings to a case of this character. It often happens that corporations with assets more than sufficient than to pay all their debts, are unable to meet an outstanding obligation as it matures, and without undertaking to lay down any definite rule by which the question of the solvency or insolvency of a corporation may be determined, it is sufficient for the purpose of this case to say that so long as the corporation is a "going concern" engaged in the conduct of the business for which it was organized and not known or believed to be insolvent

> by its officers and managers, with assets exceeding its liabilities to the extent shown by the testimony in this case, it is not in such a state of insolvency as will preclude its executing a mortgage on its property in good faith to secure a debt of the corporation, EVEN THOUGH THE DEBT MAY BE ONE FOR WHICH THE DIRECTORS ARE SECURITY. As the corporation was not insolvent it is unnecessary to examine or decide the question as to the right of an insolvent corporation to prefer creditors, or of a director of such a corporation to secure the debts thereof for which he is personally liable. It follows that a decree of the court below must be affirmed."

This case was an Oregon case and clearly defines the rights of the directors in giving security for obligations even though the director himself is liable as securtiy for the obligation, and is clearly in point with the case at Bar and gives the Directors the right to mortgage the property of the corporation for existing obligations without consent or approval of the stockholders.

As shown by the testimony of O. B. Setters found on Page 34 of the Abstract of Record the claim of the Appellant was not contracted until the latter part of the year 1921 and long after the making of the assignment to the Astoria National Bank, and that the corporation continued a "going concern" until the first day of June 1922 when it ceased to function by reason of its insolvency and at the time

that it ceased to function an assignment was made to the trustee for the purpose of liquidating its assets for the benefit of the creditors.

Calling the Court's attention to the case of GARRISON HILTON LUMBER COMPANY vs. HINSON, found in 140 Pac. Page 633 Sub. Div. Section -3- provides: "A trust fund doctrine as applicable to the assets of a corporation which is a "going concern" does not obtain in this state. Quoting from the opinion:—

> "Whatever opinion may have been originally announced by the Federal and State Courts of this country respecting the Trust Fund Doctrine as applied to a corporation, the legal principle is now established that until a corporation has either suspended its business or has become insolvent and its assets have been placed in possession of a court of equity for administration and are in the course of Final Settlement and Distribution the capital stock of the corporation does not constitute a Trust Fund upon which the general creditors have a lien for the payment of their demands."

There are many cases that could be cited from other states but the foregoing rule seems to be the established law and practice of the State of Oregon. We therefore contend that the Directors had full authority to make the assignment of the stock subscriptions as they did, and that the claim of the Astoria National Bank is a preferred claim against the unpaid subscriptions.

Taking up the matter of the assignment of the assets of the corporation to O. B. Setters on or about the first day of June 1922, which was done at a time when the Directors of the corporation had determined that it was impossible for the corporation to long function, the evidence shows that at that time the company had no assets other than the unpaid subscriptions and any assignment made to O. B. Setters of such subscriptions could not be other than subject to the rights of the Astoria National Bank in said subscriptions, and it has not been the purpose of the stockholders or the said O. B. Setters Trustee to defeat the claim of the Appellant. Our contention all along is that the Astoria National Bank hold a first lien on the unpaid subscriptions to the extent of their claim in the sum of $5,000.00 and accrued interest thereon which has not been paid, and that after this claim is paid all of the creditors (including the Appellant) should pro-rate equally in the remainder of the assets of the corporation. The corporation ceased to function by reason of the fact that it could not meet its obligations and when the liabilities were far in access of the assets, (due to the fact that a great many of the stockholders were and are insolvent and that it is and was impossible to collect their subscriptions). The stockholders were brought into this suit as defendants, and are in a limited number and were pre-

sent and agreed to the action of the Board of Directors.

We therefore contend that the decision of the Lower Court was just and strictly in accordance with law and should be sustained by this Court.

Respectively Submitted,

O. B. SETTERS,
Solicitor for Appellees.
Astoria, Oregon.

No. 4070

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),

Petitioner,

vs.

HONORABLE EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington, Southern Division.

BRIEF FOR PETITIONER.

OTTO B. RUPP,
POST, RUSSELL & HIGGINS,
PILLSBURY, MADISON & SUTRO,
Solicitors for Plaintiff.

W. V. TANNER,
Of Counsel.

TABLE OF CASES CITED.

No. 4070

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),

Petitioner,

vs.

HONORABLE EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington, Southern Division.

BRIEF FOR PETITIONER.

Statement.

This is an application for a rule to be issued from this court directed to the Honorable Edward E. Cushman, to show cause why a writ of mandamus should not issue commanding him to vacate an order made by him on July 9, 1923, in a cause brought by the petitioner herein against the Department of Public Works of Washington, an administrative regulatory body created by the laws of that state, and the attorney-general of the State of Washington, to hear and determine a motion to dismiss the bill of complaint filed in the case just mentioned, which motion Judge Cushman has heretofore refused to hear, and in the event that after a hearing such motion is denied, to make an order re-

quiring the defendants above named to file an answer to the bill of complaint.

We shall endeavor here to set forth concisely the facts which give rise to this controversy.

The petitioner (hereinafter referred to as the "company") is engaged in a general telephone and telegraph business in the State of Washington and elsewhere; the rates it charges for telephone service are subject to regulation by the State of Washington. On August 8, 1919, the Public Service Commission of that state, now the Department of Public Works (hereinafter referred to as the "department") made an order prescribing the maximum rates to be charged by the company for its service, both exchange and toll, in Washington. These rates so prescribed remained in effect until September 20, 1922, when the company filed a schedule advancing all its *exchange* rates in the State of Washington. Four days later the department issued an order suspending, for the full statutory period, the operation of these increased rates and directing the company to file a new toll rate schedule conforming in principle with the toll rates which had been effective prior to the war period.

On October 5, 1922, the company filed, as directed, the toll rate schedule and withdrew and cancelled the exchange rate schedule filed on September 20th except the rates and charges applicable to the cities of Seattle and Tacoma. In effect, what the company did on October 5th was to file a schedule increasing the exchange rates in Seattle and Tacoma and, under certain circumstances, toll rates throughout the state, but leav-

ing all the other exchange rates the same as they had been since August, 1919.

Thereafter hearings were held by the department at various times and places throughout the state.

On March 31, 1923, the department made an order, one member, the Supervisor of Public Utilities, dissenting, whereby the application of the company for increased rates in Seattle and Tacoma and for a new toll rate schedule was denied.

This order was preceded by certain findings of fact made by the department, the first one of which purports to determine the value of the used and useful property of the company in the state.

Parenthetically, it may be said that the statutes of the State of Washington, as construed by the Supreme Court of that state, provide that if the regulatory body of the state has once valued the property of a utility, the value of the property of such utility at any subsequent date is to be determined by adding to the original valuation the net additions and betterments since made to that property. Inasmuch as the company's property had been valued in 1914, the department followed the course prescribed by the statute as construed by the Supreme Court. In short, it determined the value of the company's property by adding to the original valuation in 1914 the net additions and betterments made to that property since that date.

Under the statutes of the State of Washington, when the department has made an order relative to *value,* the public service company affected, *and that company*

alone, may seek a review of the valuation order in the courts of the State of Washington, but when the department has made an order relative to *rates,* any complainant, or the public service company affected by such order, may seek a review of such order in the courts of the State of Washington. In each instance the review must be sought within thirty days after service of the order.

The company did not sue out a writ of review within thirty days, as provided by the statutes of the State of Washington, nor has it ever brought any proceedings in the state court attacking the order of March 31, 1923. It did, however, on April 24th file a bill in the United States District Court for the Western District of Washington, Southern Division, over which Judge Cushman presides, in which it alleged, *inter alia,* the filing of the rate schedule of August 8, 1919, the filing of the rate schedule of September 20, 1922, the suspension of this schedule by the department, the filing of the schedule of October 5, 1922, and the making of the order by the department of March 31, 1923. It further alleged that the cost of its property in the State of Washington and the cost of its property in the Cities of Seattle and Tacoma was substantially the rate base fixed by the department in its order of March 31, 1923; that these amounts were, for the state, the sum of $29,347,254.00, for Seattle $17,023,372.00, and for Tacoma $2,888,021.00. It then alleged that the fair value of its property in the state was $35,616,896.00, in Seattle $20,852,067.00 and in Tacoma $3,457,290.00; that under the schedule of rates in effect during the year

1922, and which schedule was continued in effect by the order of the department of March 31, 1923, the company had earned upon the *cost* of its property in the state 3.17%, in Seattle .19% and in Tacoma .89%, and that upon the *fair value* of its property under such schedule it had earned in the year 1922 in the state 2.58%, in Seattle .15% and in Tacoma .75%; that if the order of March 31, 1923, was enforced, it would be prevented from earning any return in excess of 2.11% per annum upon the fair value of its property in the state and .54% *loss* per annum upon the fair value of its property in Seattle and .56% upon the fair value of its property in Tacoma. It prayed, therefore, that the rates prescribed in the order of March 31, 1923, be decreed to be confiscatory, in violation of the Constitution of the United States, and that it be permitted to put in force the schedule of rates found by the dissenting member of the department to be just and reasonable, until such time as just and reasonable schedules of rates and charges were established according to law.

On the same date that the bill was filed, the company applied to Judge Cushman for a temporary restraining order, the nature of which is set forth in paragraph V of the petition in this proceeding, which was granted on the same day. Subpoenas were issued on that date and served on the defendants on April 25, 1923. Jurisdiction of the United States District Court over the cause had therefore fully vested on April 25th.

On April 27th, the City of Seattle sued out a writ of review in the Superior Court of the State of Washington, for Thurston County. Since the City of Seattle

had filed a complaint before the department of Public Works, alleging that the rates charged by the company in the City of Seattle were unreasonable, it may be conceded that it had a right to attack the order of March 31, 1923, inasmuch as that order was a rate order. The city, however, in that proceeding attempted to attack the valuation made by the department of the company's property. This, it may not do, as the statute does not give it such a right.

It will at once occur to the court that the proceeding brought by the City of Seattle is not such a proceeding as is described in the amendment of March 4, 1913 (37 Stat. L. 1013), to Section 266 of the Judicial Code, the effect of which would be to stay all proceedings in the suit brought by the company in the United States District Court, for this proceeding was *not* brought to *enforce* the order, but to *attack* it; nor was the order of March 31st stayed by any order in the Thurston County case.

The application for an interlocutory injunction came on to be heard before Judge Gilbert, Judge Cushman and Judge Neterer on April 30th. At that time the department and the attorney-general filed three motions, one to dismiss the complaint, another to dissolve the restraining order, and the third to stay all proceedings in the suit instituted by the company in the United States court on April 24th, because the City of Seattle had brought a proceeding in the state court.

After argument was concluded on April 30th, the three-judge court filed an order dissolving the restrain-

ing order, denying the interlocutory injunction, and stating that an opinion would be filed later.

The opinion was filed on May 23, 1923. It holds, as we understand it, that the proceeding instituted by the City of Seattle in Thurston County was not one brought to enforce the order of the department of March 31st, and therefore does not fall within the amendment to Section 266 of the Judicial Code; that the suit brought by the company on April 24th in the United States court was not prematurely brought because the company did not apply for a rehearing before the department; that under the statutes of the State of Washington, the courts of that state, in reviewing a *rate* order, act in a *judicial* capacity, because the court is given no power by that section of the statute relating to the review of a rate order, to make its own findings or fix rates, and consequently, so far as the rate provision of the order of March 31, 1923, was concerned, the suit in the United States court was not prematurely brought. It holds further, however, that the complaint filed in the United States court shows that there is a controversy as to the value of the property of the company; that under the statutes of the State of Washington the Superior Courts and the Supreme Court of that state "have legislative authority in determining the rate base, superior to that of the department," and that

> "'considerations of comity and convenience' require the court to hold that until plaintiffs have exhausted their right to relief in the superior and supreme courts,—relief, in part at least, legislative in character,—these causes must be stayed."

The court apparently considered the case of *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, to be controlling.

The court further held that if the company applied for a stay of the enforcement of the order of the department of March 31st, in the proceeding brought by the City of Seattle in the Thurston County court, and that court denied a stay and such denial was affirmed by the State Supreme Court, then the company might renew its application in the United States court for an interlocutory injunction. As we shall hereinafter point out, neither the Superior Court of Thurston County nor the Supreme Court of the State of Washington could grant the company a stay, nor would such stay be of any advantage whatsoever to the company if granted.

On July 5, 1923, the company filed a motion in the United States District Court, for the Western District of Washington, Southern Division, for an order requiring the department and the attorney-general to file, forthwith, an answer to the bill of complaint, or in default thereof that a decree *pro confesso* be entered against the department and the attorney-general. On July 9, 1923, after argument, the court declined to consider or pass upon the motion to dismiss the bill of complaint filed by the defendants on April 30th, and denied the motion to require the defendants to answer, specifically basing his ruling in both instances upon the reasons set forth in the opinion filed on May 23, 1923.

On August 2, 1923, this application was made to this court.

Argument.

The first question is, was the court justified in making the order of July 9, 1923, by which it denied the company's motion to compel the defendants to answer and refused to pass upon defendants' motion to dismiss the bill of complaint.

The action of the three-judge court in denying the interlocutory injunction is not before this court. The reasons it gave for its action may have been good or bad. With those reasons we are not now concerned, except in so far as they have been adopted by Judge Cushman as the reasons for his order of July 9, 1923. If, by the adoption of such reasons as the reasons for not hearing and determining this case on its merits, Judge Cushman has prevented or may have prevented this court from ever hearing and determining this case, then, it is the right and duty of this court, in aid of and as an auxiliary to its appellate jurisdiction, to compel him to hear and determine the case.

We think it may fairly be said that the basis for Judge Cushman's action is that he considered the case of *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, to be controlling.

It was held in that case that where the *reduced* fares prescribed had *not* taken effect and probably would not take effect until a state appellate court could, on appeal from the order of the Virginia Commission, perform its legislative function of finally fixing fares, "considerations of comity and convenience" required that the utility company should delay its application to the

United States court for relief until the legislative issues raised by those appeals, were decided or it became reasonably certain in some other way, as by dismissal of the appeals, that the prescribed fares would be put into operation. Legislative power had been imposed by the Constitution of Virginia upon its state courts. The order of the commission, therefore, was not the final legislative act. Moreover, in that case the property of the railway company had not as yet been confiscated. Its property would be confiscated only in the event that the reduced fares were finally put in operation.

The *Prentis* case is not applicable for several reasons:

First, the Washington state law expressly forbids a stay;

Second, legislative power cannot constitutionally be vested in the Washington state courts;

Third, in this case the legislative process is complete; and,

Fourth, where the utility is suffering daily from confiscation, it is not necessary that the legislative process be complete before resort is had to the United States courts.

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(1) THE WASHINGTON STATE LAW EXPRESSLY FORBIDS A STAY.

It would be useless for the company to ask either the Superior Court of Thurston County or the Supreme Court of the State of Washington to stay the enforcement of the order of March 31st, because the state courts are expressly prohibited by statute from staying

the enforcement of the order made on March 31st. The rates approved by the department in its order of March 31st had been put in effect originally on August 1, 1919. The rates, therefore, had, on March 31, 1923, been in effect *for more than one year*. On October 5, 1922, the plaintiffs filed a schedule *advancing* the rates for telephone service in the Cities of Seattle and Tacoma, and toll rates throughout the state. The statute, Section 10429, Remington's Compiled Statutes, 1922, provides:

> "That when any rate has been in force for any length of time *exceeding one year* and such rate is *advanced* by the Public Service Company, and the order of the Commission reinstates such prior rate in whole or in part, *no supersedeas* shall be *allowed* in any case from such order pending the final determination of the cause in the Superior Court, or if appealed to the Supreme court, by such Supreme court."

It is manifest, therefore, that even though the company had, within the time fixed by statute, instituted review proceedings in the Superior Court of Thurston County, neither that court nor the state Supreme Court would have been empowered to grant relief until after the final decision of the case upon its merits by the Supreme Court. Since any application to the state court for a stay must be not only futile, but also one which the company has not the legal right to make, the company should not be required to make it as a condition precedent to its resort to the United States court.

If it be argued that the state courts have inherent power to grant a stay, we reply that the state courts,

acting in a *legislative* capacity, have no such power. Hence, if they do have inherent power to grant a stay, they have it solely in the exercise of their general *judicial* power. But we may not safely apply to the state courts, acting in a purely judicial capacity, for relief. *Detroit & Mackinac Ry. Co. v. Michigan R. R. Comm.,* 235 U. S. 402.

Moreover, there is no relief, either immediate or final which the company can obtain from the state courts.

No immediate relief, because the only immediate relief would be a stay of the order of March 31st. But of what possible advantage would a stay of that order be to the company? In those cases where a regulatory body has made an order reducing rates and charges which had theretofore been in effect, a stay of that order does continue in effect a rate higher than the one prescribed by the regulatory body. In this case, however, it is asserted, and that is the basis of the bill of complaint, that the rates which had been in effect prior to the order of March 31st and which that order continued in effect, were confiscatory. A stay of the enforcement of that order, therefore, does but keep the confiscatory rate in effect.

No final relief, because in the review proceedings brought by the City of Seattle, the only possible decision the state court can make is to hold either that the order of the department of March 31st was correct or that the department made an error in that order to the disadvantage of the City of Seattle, which error, when corrected, will result in still lower rates in the City of Seattle.

We say this because the company not having within the time provided by statute, instituted a review proceeding, it cannot under the statutes of the State of Washington obtain any affirmative relief whatsoever in the state court.

We think it therefore clear that Judge Cushman has in effect held that he will not hear and determine the case brought before him until such time as the company has performed an impossible condition.

This court has the right and power, and it is its duty, to hear and determine the case on its merits. But so long as Judge Cushman interposes an insurmountable obstacle to the hearing and determination of the case before him, this court can neither exercise this right, nor perform this duty.

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(2) LEGISLATIVE POWER CANNOT CONSTITUTIONALLY BE VESTED IN THE WASHINGTON STATE COURTS.

By the Constitution of Virginia, the legislative function of establishing rates for public service companies was imposed upon the Court of Appeals of that state.

No such provision, however, is found in the Constitution of the State of Washington. If, therefore, under that constitution, legislative power cannot be imposed on the courts of that state, then a statute purporting to impose such power is unconstitutional and void.

The three-judge opinion holds that Section 10441 of Remington's Compiled Statutes, 1922, imposes upon the state courts of Washington the legislative power of determining the value of the property of public service

companies operating in that state. But if this is the effect of that section then it is void, because it is beyond the power of the legislature in the State of Washington to impose such a power or function on the courts of that state.

In the case of *Helena Water Co. v. City of Helena*, 277 Fed. 66, 68, it was held that a statute of Arkansas which attempted to empower a state circuit judge to determine on appeal from an order of a municipal council or city commission what rates would afford a utility valid and reasonable compensation, was void in that it attempted to confer upon the courts of Arkansas a non-judicial function or power. The court said:

> "In view of these provisions of the Constitution and its construction by the court of last resort of the state, the court is of the opinion that the proceeding under section 19 of the act, although denominated 'an appeal', is in fact so far as it applies to the sufficiency of the rates, a judicial proceeding, and, if the necessary facts authorizing a national court to assume jurisdiction exist, it is its duty to exercise it, when invoked. (Citing cases.)
>
> "But the power of the court to establish rates for the future is clearly a *legislative* act, and, *under the Constitution of the state, cannot be conferred on the judiciary department, and is therefore unconstitutional.*" (Citing cases.) (Italics ours.)

While the Arkansas and the Washington Constitutions differ somewhat in expression as to the separation of legislative and judicial powers, the provisions of the Washington Constitution are as effective a separation of legislative and judicial powers as if the constitution had expressly declared that they were to be kept separate.

In *Oregon R. R. & Nav. Co. v. Campbell,* 173 Fed. 957, 967, Judge Wolverton said:

> "Under the state constitution, the powers of government are divided into three separate departments, namely, the legislative, the executive (including the administrative), and the judicial; and no person charged with the official duties under one of these departments is competent to exercise any function of the other, except as provided in the Constitution itself. Section 1, art. 3, Const. Or. This is an express declaration of the segregation of the powers of government. The Constitution of the United States *as effectively segregates* such powers of government, but without an express declaration to that effect. That instrument provides (section 1, art. 1), that 'all legislative powers herein granted shall be vested in a Congress of the United States;' (section 1, art. 2) that 'executive power shall be vested in a President of the United States;' and (section 1, art. 3) that 'the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.'
>
> "Thus it is that, while the powers of government under the national Constitution are actually apportioned to or divided into three departments, *there is no express declaration* that they shall be so apportioned or divided. The thing is done by establishing, severally, each of the three departments of government, and *they are as effectually separate departments as if the Constitution had in so many words so declared as does the State Constitution.*" (Italics ours.)

The Public Utilities Com. of Dist. of Columbia v. Potomac Electric Power Company, et al., 43 U. S. Sup. Ct. Reporter, 445 (decided April 9, 1923);

State ex rel. Godard v. Johnson, 61 Kan. 803, 60 Pac. 1068;

Ex parte Riebeling, 70 Fed. 310;

Steenerson v. G. N. Ry. Co., 69 Minn. 353, 72 N. W. 713, 716;

State v. G. N. R. R. Co., 130 Minn. 57, 153 N. W. 247, 248;

State v. Barker, 116 Iowa 96, 89 N. W. 204, 208, 93 Am. St. Rep. 222, 231;

Norwalk Street Railway Company's Appeal, 69 Conn. 576, 37 Atl. 1080, 39 L. R. A. 794;

Thompson v. Redington, 110 N. E. 652;

Nebraska Telephone Co. v. State, 55 Neb. 627, 76 N. W. 171, 174;

State Racing Com. v. Latonia Agricultural Asso., 136 Ky. 173, 123 S. W. 681, 25 L. R. A N. S. 905, 914;

City of Boston v. City of Chelsea, 212 Mass. 127, 98 N. E. 620;

Butler v. State, 97 Ind. 373;

United Fuel Gas Co. v. Public Service Com., 73 W. Va. 571, 80 S. E. 931, 934;

In re County Comrs., 22 Okl. 435, 98 Pac. 557, 561;

Auditor of State v. Atchison T. & S. F. R. Co., 6 Kan. 301;

Board of Supervisors v. Todd, 97 Md. 247, 54 Atl. 963.

It has been consistently held by the Supreme Court of Washington that legislative power may not be imposed upon the courts of that state.

In *Territory ex rel. Kelly v. Stewart,* 1 Wash. 98, 110, the court said:

> "We hold that a *judicial* court *cannot* exercise legislative functions and that the *legislature cannot impose such power upon it.*"

In *Spokane v. Spokane & Inland Empire R. Co.,* 75 Wash. 651, 659, the rule was again stated:

> "This is an attempted delegation of police and legislative power. The city cannot confer its power of eminent domain, upon which it must rest its power to change the grades of its streets, upon these railway companies, nor can it throw upon the courts the burden of determining in what proportion the companies shall share the financial burdens. *No such power is vested in the courts of this state, as the power sought to be conferred is in no sense a judicial power,* but a power which can only be exercised by the city through its duly constituted authorities." (Italics ours.)

In *State ex rel. Seattle v. Public Service Commission,* 76 Wash. 492, 500, the court said:

> "Manifestly, it is wholly impractical and *beyond the proper sphere* of the courts to assume to control in any degree this purely nonjudicial duty of the commission. Any attempt on the part of the courts to do so would, it seems clear to us, be to enter the field of executive and administrative duties. *Such would be clearly subversive of our theory of government.*" (Italics ours.)

We quote from *In re Bruen,* 102 Wash. 472, at page 478:

> "These functions being essentially judicial and inherent in the courts, we are of the opinion that the

legislature has attempted to create a judicial tribunal which, at the same time, has administrative and delegated legislative powers. Such a system is not warranted under our constitutional form of government. The *legislative,* executive, and judicial functions have *been carefully* separated and, notwithstanding the opinions of a certain class of our society to the contrary, the courts have ever been alert and resolute to keep these functions properly separated. To this is assuredly due the steady equilibrium of our triune governmental system. The courts are jealous of their own prerogatives and, at the same time, studiously careful and sedulously determined that neither the executive nor legislative department shall usurp the powers of the other, or of the courts." (Italics ours.)

See also:

State ex rel. O. R. & N. Co. v. Commission, 52 Wash. 17, 26, 32; affirmed by the United States Supreme Court in *Washington ex rel. O. R. & N. Co. v. Fairchild,* 224 U. S. 510, 524, 526;

Selde v. Lincoln County, 25 Wash. 198, 206.

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(3) THE LEGISLATIVE PROCESS OF RATE MAKING IS COMPLETE.

(A) If we assume for the sake of argument only, that (a) legislative power may be imposed upon courts in the State of Washington, and (b) that the Washington state courts may determine value in accordance with the principles enunciated by the United States Supreme Court (which as a matter of fact they may not do), nevertheless the rule laid down in *Prentis v. Atlantic*

Coast Line Co., 211 U. S. 210, has no application because the legislative process in this particular controversy is now complete.

This is clear from the following facts:

The order determining value was made on March 31, 1923. The company, *but no one else,* had the right to seek a review of the order determining value. Paragraph XIV of Section 10,441 provides that

> "any *company* affected by the findings, or any of them, believing such findings, or any of them to be contrary to law or the evidence introduced, or that such findings are unfair, unwarranted, or unjust, may institute proceedings in the Superior Court of the State of Washington in the county in which the hearing has been held."

And paragraph XV of the same section provides that

> "said public service company, or the commission, shall have the right to appeal from the decision of the Superior Court to the Supreme Court of the State of Washington as in civil cases."

But the company did not, within thirty days, sue out nor has it ever sued out a writ to review the order of March 31st. The company, therefore, cannot, in any case now pending in the state courts of Washington, have the findings of the department relative to value, reviewed, nor can it now commence any proceeding by which such findings may be reviewed.

The Cities of Seattle and Tacoma cannot have such findings reviewed, for the statute withholds from them the right to seek a review of the department's findings of value. This is manifest, not only from the express

wording of the statute, but also from the construction placed upon the statute by the Supreme Court of the State of Washington in the recent case of *Everett v. Department of Public Works,* 25 Wash. Dec. 357, 359 (decided June 22, 1923). The court there said:

> "It is plain that a complainant may have a review as to some findings or orders made by the department, but §10,441 is specific to the effect that *only the public service company* affected may have a review of the questions directly affecting the valuation of its property. What purpose the legislature had in making the distinction noted in these two sections, is not for us to discuss. The wording of the statute is plain and we are bound by it."

(B) Section 10,441 provides for a general investigation and the making of findings concerning matters material to the determination of the valuation of a public utility. These findings may be reviewed and corrected by the courts, and as made or corrected "when properly certified under the seal of the commission" are "admissible in evidence, in an action, proceeding or hearing", and are "conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing".

The findings relative to the value of the company's property which were introduced in evidence in the hearing of 1923 before the department were made in 1914. These findings were not at that time reviewed and cannot now be reviewed in the state courts.

Conceding, therefore, that legislative power may be imposed upon the courts of Washington, nevertheless there is no opportunity for the exercise of any such

power in this case. The court cannot now review the valuation finding made in 1914 and even though the valuation findings were now subject to review in the state courts, a review of such findings would not affect the rate order of March 31, 1923, which has become final so far as resort to state courts is concerned by the failure to review that order within the thirty day period provided for by the state statute.

The rule that the rate making process may become final so as to permit resort to the United States courts by the failure of the utility to invoke the action of the final state legislative authority under the provisions of the state law, is recognized in the *Prentis* case. The court there declined to proceed until the final action of the legislative authority of the state, namely, the Court of Appeals of Virginia. Attention was directed, however, to the provisions of the Virginia law requiring appeals to be taken within six months from the date of the order of the primary regulatory body, and to the fact that it might be found in that case that it was too late to appeal. The court, in consequence, declined to dismiss the bills, holding that they should be retained to await the result of the appeals "if the companies see fit to take them", and that "if the appeals are dismissed as brought too late, the companies will be entitled to decrees".

In the case now before this court, the company has failed to institute any proceedings whatsoever in the state courts. The time within which such proceedings might have been begun expired on April 30th, the day on which the application for an interlocutory injunction

was argued. The company can obtain no relief, as we have shown, from the confiscation of its property in the suit brought by the City of Seattle.

Conceding, therefore, for the moment, that in respect to valuation findings, the state courts of Washington do possess legislative power, nevertheless the proceedings in this case have reached the judicial stage within the rule announced in the *Prentis* case.

(C) The controversy between the company and the department is whether the value of the company's property is to be determined in accordance with the principles enunciated by the United States Supreme Court or in accordance with a statute of the State of Washington which is in conflict with these principles.

The United States Supreme Court has decided time and time again that the value of the property of a public utility is to be determined as of the time when the inquiry regarding rates is made. We need cite on this proportion only the two recent cases of *State of Missouri ex rel Southwestern Bell Telephone Co. v. Public Service Commission of Missouri,* 43 Sup. Ct. Rep. 544, and *Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia,* 43 Sup. Ct. Rep. 675.

Neither the department nor the Superior Court of Thurston County, nor the Supreme Court of the State of Washington, assuming that these courts act in a legislative capacity, can, under the laws of the State of Washington as interpreted by the Supreme Court of that state, fix the value of the property of a public utility

as of the time of the inquiry concerning rates, if as here there has been a previous valuation of the property of the utility. We say this because the Washington State Supreme Court in *State ex rel Spokane Gas, Light Company v. Kuykendall,* 119 Wash. 107, has construed Section 10,441, Remington's Compiled Statutes, 1922, as meaning that when the department has once valued the property of a public utility, the value of such property at any subsequent date is to be arrived at by adding to the original valuation the net additions and betterments made to that property since the original valuation.

At the time of the hearings in 1923, before the department, the findings made in 1914 were supplemented by evidence showing the net additions and betterments made to the property since 1914. This was done for the purpose of bringing the valuation, made in 1914, down to date, as clearly appears from the following excerpt from Finding No. 1 of the findings made by the majority members of the department and a similar finding made by the dissenting member of the department in his opinion:

> "As to the value of the Pacific Company's plant in Washington, the procedure was merely to bring up to date the valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922."
>
> (Page 74 of exhibit "D" to bill of complaint and page 115 of exhibit "E" to bill of complaint, which said bill of complaint is exhibit "A" attached to the petition.)

It is a matter of common knowledge, of which this court will take judicial notice, that there has been a great advance in prices at least since the year 1916. It is obvious, therefore, that the department could not take present prices into consideration, in determining the value of the whole property, and it is equally manifest that the state courts, under the rule laid down in the *Spokane Gas Company* case, will not consider present prices except in so far as they are reflected in the company's property which has been installed since the rise in prices was experienced.

As shown by the bill of complaint, the value found by the department is substantially the same as the original cost of the property to the company. If the company, therefore, had gone into the state court, the controversy before that court would, as to value, be solely whether value is to be entirely based upon the original cost of the property or whether value is to be determined as of the time when the inquiry regarding rates is made. We say that

> "the property is held in private ownership, and that it is *that property* and *not* the original cost of it of which the owner may not be deprived without due process of law." (*Minnesota Rate* cases, 230 U. S. 352, 434.)

But surely the determination of the question as to whether value is to be determined solely from a consideration of original cost, or whether original cost is but one of the elements which enter into the determination of what is the value of the property at the time the inquiry is made, is purely a *judicial* question.

(D) Again, assuming for the sake of argument only, that legislative power may be imposed upon the state courts of Washington and that the courts of that state may apply the rule prescribed by the United States Supreme Court for determining value, nevertheless in deciding whether in any particular controversy the court is acting judicially or non-judicially, the test to be applied is that "The nature of the final act determines the nature of the previous inquiry". (211 U. S. 227.)

If there is a commission empowered to determine value in the exercise and aid of its general authority, independent of a rate proceeding, then the action of a reviewing court, having the power to substitute a different value, might be considered legislative. But if a court is reviewing the valuation in a rate case in order to determine whether the rates prescribed by the regulatory body are confiscatory or not, the action of the reviewing court is judicial, unless it has authority to substitute other rates for those found by the regulatory body, which the courts of the State of Washington may not do.

In the case at bar, the order of March 31st establishes certain rates. If that order were reviewed in the state courts, those courts could not fix a new rate. The final act which that court might perform would necessarily be the act of declaring whether the rates were reasonable or not, and as the nature of the final act was judicial it makes the "nature of the previous inquiry" judicial.

(4) WHERE THE UTILITY IS DAILY SUFFERING CONFISCATION, IT IS NOT NECESSARY THAT THE LEGISLATIVE PROCESS BE COMPLETE BEFORE A RESORT IS HAD TO THE UNITED STATES COURTS.

The *Prentis* case is based upon "considerations of comity and convenience". These considerations do not require United States courts to defer action, even pending the conclusion of the legislative process of rate making, *in a case where the utility is suffering daily from the confiscation of its property.*

The case of *Oklahoma Natural Gas Company v. Russell,* U. S. Adv. Ops. 1922-1923, p. 395, is directly in point. The Constitution of Oklahoma, like that of Virginia, confers legislative power upon the courts. In that case there had been no final decision of the Supreme Court of the state, which was the last legislative tribunal. The United States Supreme Court held, however, that in view of the fact that the utility was suffering daily from confiscation under the rate to which it was limited, the three-judge court should have heard the application for an interlocutory injunction upon the merits. In support of its conclusions, the court cited *Love v. Atchison etc. Ry. Co.,* 185 Fed. (C. C. A.) 321, which states very clearly the reasons supporting court intervention pending the completion of the legislative process. We quote from the *Love* case (p. 327):

> "The legislative function in rate-making looks to the future and determines what future rates shall be. But when rates, either tentative or final, have been put and are maintained in actual operation under penalty of severe fines, the question whether or not their effect is to take the property of the railroad companies affected thereby with-

out just compensation is a judicial one, conditioned by past or present facts, and the national courts cannot be deprived of jurisdiction of it by the fact that the process of making the tentative rates is yet incomplete. It is as clear a violation of the Constitution, and one as promptly remediable in the national courts, to take the property of a railroad company without just compensation by the enforced operation of tentative rates during the process of their making as by the operation of final rates after that process is complete. Railroad companies that have been, are, or will be deprived of parts of their property devoted to the public use of transportation without just compensation during the continuance of the rate-making process by provisions of a state Constitution or of a state law, or by orders of a state commission, prescribing tentative rates and putting them in effect during the rate-making process under severe penalties, may maintain suits for and obtain relief by injunction during the continuance of the rate-making process to the same extent that they may after the process is completed. These suits were not prematurely brought."

The question was again before the Supreme Court of the United States in *Prendergast v. New York Telephone Company,* U. S. Adv. Ops. 1922-23, p. 466, where the court followed and cited with approval *Oklahoma Natural Gas Company v. Russell,* supra, and *Love v. Atchison etc. Co.,* supra, concluding as follows:

> "Upon a showing that such reduced rates were confiscatory, the company was entitled to have their enforcement enjoined *pending the continuation and completion of the rate-making process.*" (Italics ours.)

THE RULE TO SHOW CAUSE SHOULD BE MADE ABSOLUTE.

The company filed a bill in the United States district court for the Western District of Washington on April 24th, seeking to enjoin the enforcement of the order of March 31st, which order it claimed to be confiscatory of the company's property.

At the time the company took this action no proceedings of any kind had been brought in the state courts of Washington, nor was any proceeding brought by anyone in the state courts of Washington until two days after service of process had been made upon the members of the department and the attorney general.

The company as a California corporation had the right to invoke the jurisdiction of the United States court on the ground of diversity of citizenship. It also had the right to invoke the jurisdiction of that court upon the ground that the order was confiscatory of its property, and therefore in violation of the constitution of the United States.

That it had a right to invoke the jurisdiction of the United States court is clear.

In *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 40, the court said:

> "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction, and in taking it that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which by law brings the case within the jurisdiction of a Federal court.

> *The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.''* (Italics ours.)

In *Prentis v. Atlantic Coast Line,* 211 U. S. 210, 228, the court said:

> "Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. *They are not to be forbidden to try those facts before a court of their own choosing if otherwise competent.''* (Italics ours.)

See also:

Ex parte Young, 209 U. S. 123, 144;

Louisville & Nashville R. R. Co. v. Garrett, 231 U. S. 298, 311;

Wadley Southern Ry. Co. v. Georgia, 235 U. S. 651, 660.

The company, therefore, had the right, after the issuance of the order of March 31st, to go either into the state court or into the United States court. It chose the last named.

We do not understand that the *nisi prius* judge questioned our power to choose between these two courts, but his action deprives us of the *exercise* of our right of choice. We say this, because he has stayed all proceedings in the suit brought in the court presided over by him until such time as the company

applies for a stay of the enforcement of the order of March 31st in the state court, which stay can not be granted by that court.

But the right to resort to the United States court is an empty right if that court refuses to act. The purpose of all judicial proceedings is to obtain a judgment or decree determining the rights of the parties to the action or suit. The right to file a bill is but the shadow of a right unless the court will proceed to act and enter a decree.

Moreover, as we have shown, the state court has no power *under the statute* to grant a stay of the enforcement of the order of March 31st. If it has the right, therefore, to grant a stay, it grants such a stay in the exercise of its inherent judicial power. Hence, if the company applies for a stay it must, knowing the law, be deemed to have invoked the judicial power of the state court. But if the company once invokes the judicial power of the state court, there certainly is danger that the final decision in the case now pending in Thurston County will be deemed to be *res judicata,* at least so far as the rates applicable to the City of Seattle are concerned, and, in consequence, the District court and this court will be deprived of the right to determine whether the rates applicable to Seattle are confiscatory or not.

Detroit etc. v. Michigan R. R. Com., 235 U. S. 402.

In that event this court can never exercise its undoubted right to hear this case on appeal. That being

so, this court will make the rule absolute in aid of and as auxiliary to its appellate jurisdiction.

In *McClellan v. Carland,* 217 U. S. 268, 280, a suit had been brought in the Circuit Court of the United States, praying an adjudication by that court that the complainants in such suit were the sole heirs at law and next of kin of one John C. McClellan, deceased. The defendant in that suit, one Blackman, the special administrator of the estate of McClellan, deceased, filed an answer in the suit. Thereafter the attorney general of South Dakota asked leave to intervene in the case, and, upon hearing, the circuit court overruled the motion and ordered that the further prosecution of the action in the United States court be stayed for the period of ninety days, for the purpose of allowing the State of South Dakota to commence an action of escheat in the state courts of that state, and in the event that such action was commenced within that time, then the pending action in the United States court to be stayed until the determination of such action brought by the State of South Dakota. The complainants filed a motion to vacate the order staying the proceedings in the United States court. Upon the denial of this motion a petition for mandamus was filed in the Circuit Court of Appeals, and, subsequently, the petition was denied. A writ of certiorari was then sued out to the United States Supreme Court. That court said:

> "But we think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the

appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below. * *

"Inasmuch as the order of the Circuit Court staying the proceeding until after final judgment in the state court *might* prevent the adjudication of the questions involved, and thereby prevent a review thereof in the Circuit Court of Appeals, which had jurisdiction for that purpose, we think that court had power to issue the writ of mandamus to require the Circuit Court to proceed with and determine the action pending before it. * * *

"So far as the record presented to the Circuit Court of Appeals shows, the only ground upon which the Circuit Court acted in postponing the suit was because the State of South Dakota, which had applied to be made a party, and which application was denied, was about to begin a suit in the state court to determine an escheat of the estate of John C. McClellan, therefore the action was stayed, first, until the beginning of such suit, and then until it was determined. It, therefore, appeared upon the record presented to the Circuit Court of Appeals that the Circuit Court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the state court. This, it has been steadily held, a Federal court may not do. *Chicot County v. Sherwood,* 148 U. S. 529, 534.

"It cannot be denied that a Circuit Court of the United States, like other courts, had power to postpone the trial of cases for *good* reasons, but by the orders made in this case the Federal Court withheld the further exercise of its authority until the state court, by its action in a case involving all the parties, might render a judgment which would be *res judicata*, and thus prevent further proceedings in the Federal court." (Italics ours.)

But the writ of mandamus is allowable not only in those cases where a final decree in a state court might become *res judicata,* and thus render ineffectual a resort to the courts of the United States, but also in those cases where, for erroneous reasons, proceedings in a court of the United States have been stayed, or the court has refused to proceed with convenient speed to try and determine the controversy, thus preventing a *seasonable* exercise of the jurisdiction of the appellate court. That this is a correct statement will, we think, be made clear by a few illustrative cases.

In the early case of *Livingston v. Dorgenois,* 7 Cranch. 577, 3 L. Ed. 444, Livingston filed a suit in the district court of the United States, in which he alleged that he was the owner of a certain tract of land in the State of Louisiana; that he had been forcibly dispossessed thereof by the marshal of the District of Orleans, and prayed that he might be restored to the possession of his property. The marshal answered and pleaded in bar that prior to the time he dispossessed Livingston he had received a mandate from the President of the United States, commanding him to remove all persons from the land in question, and that in accordance with such mandate he had removed Livingston and his servants from the property of which Livingston claimed to be the owner. Livingston filed a general demurrer to this answer, but upon the day assigned for argument the United States district attorney moved the court

that the proceedings in the cause be stayed, because the suit was a collusive one.

The district court stayed the proceedings. Thereupon Livingston sued out a writ of error to the Supreme Court of the United States. After argument in the Supreme Court, Livingston dismissed his writ of error, presumably because no such writ would lie, and prayed that a writ of mandamus be issued to the United States district judge, which writ was granted.

In *Ex parte Parker,* 120 U. S. 737, 743, Parker and one Boyer were defendants in an action brought in the district court of the Territory of Washington. A judgment adverse to Parker and Boyer having been rendered by the trial court, Parker sued out an appeal to the Supreme Court of the territory. Parker served a notice upon Boyer, his co-defendant, which the Supreme Court of the territory held to be insufficient, and dismissed the appeal of Parker. The Supreme Court of the territory also held that the certificate to the transcript of record was not sufficient, and that for that reason also the appeal should be dismissed.

The United States Supreme Court held that Parker had complied with the statute of the Territory of Washington relative to appeals in cases where only one of the defendants desired to appeal, and that the certificate to the transcript of the record was sufficient. It said:

> "That writ properly lies in cases where the inferior court refuses to take jurisdiction where by law it ought so to do, or where, having obtained

jurisdiction in a cause, it refuses to proceed in the due exercise thereof."

In *ex parte Simons,* 247 U. S. 231, 239, Mrs. Simons brought an action in the District Court of the United States against William Nelson Cromwell and Louis H. Cramer, as executors under the last will and testament of Frank Leslie, deceased. The complaint set forth two causes of action. On motion of the defendant executors, Judge Hough ordered the first cause of action to be transferred to the equity side of the court and docketed as an equity cause, and to be stricken out of the complaint in the action at law. He based his ruling in this regard upon the ground that by the law of the State of New York, Mrs. Simons could not sustain the first cause of action at law. An application for mandamus was made to the United States Supreme Court and granted. That court held that under the law of the State of New York the first cause of action could be sustained at law.

Continuing, it said:

"If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not matter very much in what form an extraordinary remedy is afforded in this case. But as the order may be regarded as having repudiated jurisdiction of the first count, mandamus may be adopted to require the District Court to produce and to give the plaintiff her right to a trial at common law."

In *Barber Asphalt Pav. Co. v. Morris,* 132 Fed. 945, 955, will be found a somewhat extensive review of the decisions of the United States Supreme Court in which that court has held that a writ of mandamus should issue. After such review the Circuit Court of Appeals for the Eighth Circuit said:

> "The action in the Circuit Court to which the application of the petitioner relates is within the appellate jurisdiction of this court. It may be reviewed here by a writ of error to reverse any final judgment that may be rendered in it. The order which stays that action until the final determination by the state courts of the questions it involves prevents both the independent adjudication of those questions by the United States Circuit Court and the review of that adjudication by this court, and thus destroys, or *greatly impairs,* the appellate jurisdiction of this court in that case. The very purpose of the grant to this court of the power to issue the writ of mandamus was to enable it to protect and maintain this jurisdiction, and that grant not only conferred the power, but it necessarily imposed upon this court the duty to issue its writ of mandamus to impel the court below to proceed *with all convenient speed* to the trial and adjudication of the controversy between citizens of different states in which its jurisdiction has been invoked to the end that the appellate jurisdiction of this court over its action may be *seasonably* and effectually exercised.
>
> "Finally, it is insisted that the writ of mandamus should not issue in this case because that writ may not be used to compel a subordinate court to reverse or revise its decision of a question properly submitted for its consideration in the progress of a case before it, or to direct it how to decide or by what rules to proceed. Ex parte Whitney, 13 Pet. 404, 10 L. Ed. 221; Ex parte Bradstreet, 8 Pet. 588,

8 L. Ed. 1054; Barrow v. Hill, 13 How. 54, 14 L. Ed. 48. It is undoubtedly the general rule that a court has no power by writ of mandamus to compel a subordinate judicial officer to reverse a conclusion already reached, to correct an erroneous decision, or to direct him in what particular way he shall proceed or shall decide a specified question. But it is equally a part of this general rule that the court always has the power by means of such a writ to compel such an officer to proceed to try and decide a controversy within his jurisdiction, or to perform any other plain duty imposed by law. Kimberlin v. Commission to Five Civilized Tribes, 104 Fed. 653, 655, 44 C. C. A. 109, 111; Minnesota Moline Plow Co. v. Dowagiac Mfg. Co., 126 Fed. 746, 61 C. C. A. 352. The power to compel such an officer to *proceed to the trial and determination of a case which it is his duty to hear and decide necessarily includes within it the power to compel him to reverse and set aside any erroneous decision he may have made to the effect that he will not proceed to such a trial and judgment.* Livingston v. Dorgeonis, 7 Cranch, 576, 588, 3 L. Ed. 444; Ex parte Bradstreet, 7 Pet. 634, 649, 8 L. Ed. 810; New York Life & Fire Ins. Co. v. Wilson, 8 Pet. 291, 303, 8 L. Ed. 949; Ex parte Roberts, 15 Wall. 384, 386, 21 L. Ed. 131; Ins. Co. v. Comstock, 16 Wall. 258, 270, 21 L. Ed. 493." (Italics ours.)

See also:

United States v. Malmin, 272 Fed. 785;

Grable v. Killits, 282 Fed. 185, 196;

In re Watts, 214 Fed. 80;

In re Grossmayer, 177 U. S. 48.

We submit that the record before this court shows that on April 24, 1923, the District Court of the United

States acquired complete jurisdiction of the cause instituted on that date by the company; that the company has an unquestioned right to have a speedy and final adjudication of the controversy existing between it and the department; that, for erroneous reasons, the district judge has declined to hear and determine the controversy, and that this court in the aid of its appellate jurisdiction is not only entitled to but has imposed upon it the duty to compel the trial judge to proceed to a trial and determination of the case lawfully brought in the court over which he presides.

Dated, August 15, 1923.

Respectfully submitted,

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